88-742

No. 88-_____

Supreme Court, U.S.
FILED
OCT 31 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN VONHOF, LARRY BELL, and
DONALD NOLL,

Petitioners,

v.

THE STATE OF WASHINGTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TIMOTHY K. FORD
600 Pioneer Building
Seattle, WA 98104
206/622-5942

ATTORNEY FOR PETITIONERS

QUESTION PRESENTED

Is an on-site physical inspection of a residence and the surrounding curtilage, by a county tax assessor, a search subject to the warrant clause of the Fourth Amendment?

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED . . . 3

STATEMENT OF THE CASE 5

1. The Search 5

2. The Proceedings in the Trial Court 8

3. The Court of Appeals' Decision 9

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW 11

REASONS FOR GRANTING THE WRIT 11

I. THE DECISIONS OF THE STATE COURTS BELOW ARE IN CONFLICT WITH THE DECISIONS OF THIS COURT AND THE LANGUAGE AND INTENT OF THE FOURTH AMENDMENT 11

CONCLUSION 17

TABLE OF AUTHORITIES

Page

GM Leasing Corp. v. United States, 429 U.S. 338 (1977) 15,16

Katz v. United States, 389 U.S. 347 (1967) 16

Payton v. New York, 445 U.S. 573 (1980) 14

Seattle v. See, 67 Wn.2d 475, 408 P.2d 262 (1965), reversed sub nom. See v. Seattle, 387 U.S. 541 (1967) 12,13

State v. Vonhof, 51 Wn.App. 33, 751 P.2d 1221 (1988) 2

United States v. Dunn, 107 S.Ct. 1134, (1987) 10

STATUTES

28 U.S.C. 1257(3) 2

RCW 84.08.050 4

RCW 84.40.025 3

CONSTITUTIONAL PROVISIONS

United States Constitution, Fourth Amendment 3,11,13,16

OTHER AUTHORITIES

Barratt, Personal Rights, Property Rights, and the Fourth Amendment, 1960 SUP. COURT REV. 46 (1960) 13

3 Elliott's Debates 448 (1954) 14

LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION 41 (1937) 14

No. 88-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN VONHOF, LARRY BELL, and
DONALD NOLL,

Petitioners,

v.

THE STATE OF WASHINGTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF
WASHINGTON

Petitioners John Vonhof, Larry Bell and Donald Noll pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Washington, dated April 7, 1988.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law by the Hon. Fred Stewart, Judge of the Superior Court of Ferry County, Washington, are unreported and are reprinted as Appendix A to this Petition. The opinion of the Court of Appeals of the State of Washington, Division Three, is reported at 51 Wn.App. 33, 751 P.2d 1221 (1988), and is copied in Appendix B to this Petition. A facsimile of the letter from the Deputy Clerk of the Supreme Court of Washington announcing that Court's denial of the Petition for Review of the State Court of Appeals decision, is attached as Appendix C to this Petition.

JURISDICTION

Review was denied by the Supreme Court of Washington by order entered on September 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case also involves the following provisions of the laws of the State of Washington:

RCW 84.40.025:

> For the purpose of assessment and valuation of all taxable property in each county any real or personal property in each county shall be subject to visitation, investigation, examination, discovery and listing at any reasonable time by the county assessor of the county or by any employee thereof designated for the purpose by the assessor.
>
> In any case of refusal to such access, the assessor shall request assistance from the department of revenue which may

invoke the power granted by Chapter 84.08 RCW.

RCW 84.08.050:

The department of revenue shall:

(1) Require individuals, partnerships, companies, associations and corporations to furnish information as to their capital, funded debts, investments, value of property, earnings, taxes and all other facts called for on these subjects so that the department may determine the taxable value of any property or any other fact it may consider necessary to carry out any duties now or hereafter imposed upon it, or may ascertain the relative burdens borne by all kinds and classes of property within the state, and for these purposes their records, books, accounts, papers and memoranda shall be subject to production and inspection, investigation and examination by said department, or any employee thereof designated by said department for such purpose, and any or any real and/or personal property in this state shall be subject to visitation, investigation, examination and/or listing at any and all times by the department or by any employee thereof designated by said department.

STATEMENT OF THE CASE

John Vonhof, Larry Bell and Donald Noll were convicted of growing marijuana, in the Superior Court of Ferry County, Washington. The charges against them were based on evidence seized in searches of their property by the Ferry County Sheriff and his agents.

1. The Search

On April 7, 1986, Brian Royer--an appraiser with the Ferry County Assessor's Office--entered onto the property surrounding a residence owned by defendants John Vonhof and Larry Bell near Malo Lake in rural Ferry County. To reach the defendants' property, Mr. Royer had to pass through two gates, and pass by several "No Trespassing" signs along the private roadway leading to the property and on the gates themselves. Mr. Royer testified he did not consider that the "No Trespassing" signs applied to him, because he thought he

had legal authority to enter despite them. He went through the open gate, past the signs, and--although he found no one home--he proceeded to inspect the property.

In doing his inspection Mr. Royer took photographs of the exterior of the house, made measurements of it, and examined its water source. He then turned his attention to an outbuilding approximately sixty yards away, enclosed within the fenced area around the house. He walked off the dimensions of that building and knocked on its sides to see if they were insulated. While he was doing that, he noticed what he described as a "strong odor of marijuana" which he "figured ... was coming from inside the building." He continued his investigation, inspecting the building doors and generator, and looking into a tool shed around the side, where he noticed water hoses and two circular heating ducts which appeared to go into the interior of

the building. According to Mr. Royer, "at that point it was obvious what I'd stumbled across," and he left.

From the subject property, Mr. Royer went to a nearby business where he telephoned Ferry County Sheriff Richard Baldwin to report what he had observed. Later that day Sheriff Baldwin interviewed Mr. Royer at the Ferry County Sheriff's Office. Mr. Royer reported to Sheriff Baldwin what he had seen, and what he believed he had smelled, and made out a written statement about it.

The next day--April 8, 1986--Sheriff Baldwin applied for a search warrant for the subject property. The warrant was issued by Norman Sauer, as a part-time pro tem Judge of the Ferry County District Court. The Sheriff and several officers served this warrant later that day. Their search uncovered a quantity of marijuana growing under Halide lights inside the

outbuilding, and evidence of the defendants' ownership and occupancy of the building inside the residence nearby it. That evidence formed the basis for the charges of manufacturing of marijuana filed against the defendants in this case.

2. The Proceedings in the Trial Court

Prior to trial, the defendants all made timely motions to suppress the evidence seized under the search warrant on a variety of Fourth Amendment grounds. The trial court, the Hon. Fred Stewart, denied those motions as to most of the property seized under the warrants.

The trial court's principal holding was that Brian Royer's entry into the subject premises was not a search within the meaning of the Fourth Amendment, because Mr. Royer was acting as an appraiser for the Ferry County Assessor's Office, and not at the direction of law enforcement. Conclusion of Law A, Appendix

A-13. The trial court thus denied the defendants' suppression motions and admitted evidence which, the defendants stipulated, would be sufficient to convict them as charged if admitted at trial. Guilty findings were entered on that stipulation and the defendants filed a timely appeal to the Washington Court of Appeals.

3. The Court of Appeals' Decision.

The Court of Appeals affirmed the denial of suppression and the convictions. The Court of Appeals rejected the State's arguments, and the trial court's findings, that Mr. Royer's "activities did not invoke constitutional protections because he was not acting with law enforcement encouragement and had no enforcement authority." Appendix B-5. It held that "direct law enforcement involvement is not a prerequisite to application of the protections of ... the Fourth Amendment

..." Ibid. However, the Court of Appeals found that Mr. Royer's entry could be upheld, because he was on "legitimate business," since his inspection was authorized by statute.

> Mr. Royer was on legitimate business when he inspected the defendants' property. RCW 84.40.025 authorizes the Assessor to visit, investigate and examine property at any reasonable time.

Appendix B-8. Although the Court of Appeals, like the trial court, did not accept the State's argument that the area Mr. Royer inspected was constitutionally unprotected,[1] it nonetheless held Mr. Royer's actions required no warrant because he "went only where he needed to go to conduct his inspection." Appendix B-9. A timely petition to reconsider this decision

---

[1]Both courts implicitly accepted the defense position that the entire area Mr. Royer inspected was within the curtilage of the residence, since it was part of an undivided area, enclosed by a fence, which surrounded the residence itself. Cf. United States v. Dunn, 107 S.Ct. 1134, 1139 n.4 (1987).

was denied, as was an application for discretionary review by the Supreme Court of Washington. Appendix C.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

In both courts below, the defense arguments against Mr. Royer's actions, and the decisions rejecting those arguments, explicitly referenced the Fourth Amendment of the Constitution of the United States. See Appendix A-13-14; Appendix B-6, 7 and 9.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS OF THE STATE COURTS BELOW ARE IN CONFLICT WITH THE DECISIONS OF THIS COURT AND THE LANGUAGE AND INTENT OF THE FOURTH AMENDMENT.

County Assessor Brian Royer's entry onto the Vonhof/Bell property unquestionably constituted a governmental search within the meaning of the Fourth Amendment. See Appendix B-4. Although that search was authorized by no warrant, and although it involved areas within the

curtilage of a residence, the Court of Appeals nonetheless upheld it, saying Mr. Royer was on "legitimate business." Appendix B-7-8.

This holding tracks the logic of Seattle v. See, 67 Wn.2d 475, 408 P.2d 262 (1965), reversed sub nom. See v. Seattle, 387 U.S. 541 (1967). In See, as here, the Washington State Court upheld warrantless searches by government inspectors--emphasizing they did not involve entries into the home, and that they were authorized by ordinance--because it found them "reasonable." 67 Wn.2d at 484-485. This Court reversed, squarely holding that "reasonableness" is not enough, and that a search made without consent into a private area could only be made with a warrant authorizing entry. See v. Seattle, supra, 387 U.S. at 545-546.

Much like the state court in See, the Court of Appeals here held that, so long as

a County Assessor remains within the scope of his "legitimate business," warrantless administrative inspections of private areas require no judicial authorization. To allow that ruling to stand would undermine the principle of See, in a context--residential dwellings--in which the Fourth Amendment's protections should be even more jealously guarded.

The Fourth Amendment was enacted to protect private homes from warrantless governmental intrusions; and intrusions by tax agents were a matter of particular concern of the framers.

> When Pitt denounced the cider tax and James Otis spoke out against the writs of assistance and Patrick Henry opposed the adoption of the Constitution without the Bill of Rights, they were primarily interested in protecting the homes of ordinary persons against indiscriminate and unreasonable governmental invasions.

Barratt, Personal Rights, Property Rights, and the Fourth Amendment, 1960 SUP. COURT

REV. 46, 71 (1960) (footnotes omitted). Pitt's defense of the right of the "poorest man ... in his cottage [to] bid defiance to all the forces of the crown," which "echoed and re-echoed throughout the Colonies," Payton v. New York, 445 U.S. 573, 601 n.54, (1980) warned "particularly against the dangerous precedent of admitting officers at the ecise into private houses." LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION 41 (1937).[2] Patrick Henry demanded a bill of rights to "restrai[n] within proper bounds" the power of government agents to "go in your cellars and rooms, and search, ransack, and measure everything you eat, drink, and wear." 3 Elliott's Debates 448-

[2]The tax to which Pitt spoke applied to "'subjects who from the growth of their own orchards, make Cyder and Perry'" and made their "'private houses . . . liable to be searched at pleasure.'" LASSON, supra, at 42. It was later repealed, "coincidental with the resolution of the House of Commons concerning general warrants." Ibid.

9 (1954). The Court reviewed that history, and rejected an argument "that the Fourth Amendment was not intended to cover intrusions into privacy in the enforcement of the tax laws," in GM Leasing Corp. v. United States, 429 U.S. 338, 355 (1977).

> Indeed, one of the primary evils intended to be eliminated by the Fourth Amendment was the massive intrusion on property undertaken in the collection of taxes pursuant to general warrants and writs of assistance.

Ibid.

The mechanism devised by the framers of the Fourth Amendment to curb that "evil" was the requirement of search warrants issued by neutral magistrates upon probable cause. The essential holding of See, and of GM Leasing, was that this kind of official intrusion was

> governed by the normal Fourth Amendment rule that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." Camera v. Municipal

Court, 387 U.S. at 528-529, 18 L.Ed.2d 930, 87 S.Ct. 1727.

GM Leasing Corp. v. United States, 429 U.S. at 358. The decision below is irreconcilable with that rule.

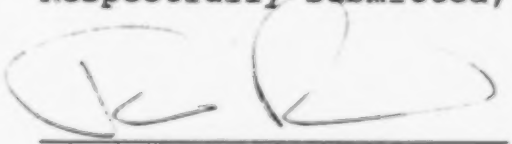
Moreover, this decision would create an exception which would logically swallow the rule requiring warrants, even for entries by police or other governmental officials. The Fourth Amendment's protections turn in large part on citizens' "reasonable expectation of privacy". Katz v. United States, 389 U.S. 347, 357 (1967). The ruling of the state court here exposes the home of every property owner to unconsented, judicially unauthorized entry and inspection. If citizens must assume their residential property can at any time be inspected without warning by one type of governmental agent, they can hardly maintain a "reasonable expectation" it will remain private from others.

This sacrifice of the most central enclave of privacy to governmental expediency, was exactly what the Fourth Amendment was enacted to prevent. A writ of certiorari should issue to examine the lower courts' acceptance of that.

CONCLUSION

The Petition should be granted.

Respectfully submitted,



Timothy K. Ford
600 Pioneer Building
Seattle, WA 98104

Attorney for Petitioners

October 31, 1988.

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR FERRY COUNTY

STATE OF WASHINGTON, Plaintiff, v. JOHN C. VONHOF, LARRY D. BELL and DONALD E. NOLL, Defendants.	)	No. 7800 HEARING, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR 3.6 HEARING

I. HEARING.

On June 17, July 14 and October 23, 1986 the Court held a hearing under CrR 3.6. Present on all dates were defendant John Vonhof and his attorney, Timothy Ford, and defendants Larry Bell and Donald Noll and their attorney, Richard Troberman, and plaintiff's attorney, Allen Nielson. Testimony was given by Sheriff Richard Baldwin, Appraiser Brian Royer, Deputy Jody Spurgeon and defendant John Vonhof. The

Court also considered 11 exhibits, a "Plaintiff's Response to Interrogatories Regarding Prior Incidents Referred to in Search Warrant Affidavit" of 171 pages, and the respective memoranda and arguments of counsel.

II. FINDINGS OF FACT

Based on the evidence introduced at the above hearing the Court makes the following findings of fact:

A. Appraiser's Entry Onto the Defendants' Property.

1. Brian Royer is an appraiser with the Ferry County Assessor's Office. He was so employed in April, 1986; he has been an appraiser, and previously assessor, for a total of six years.

2. On April 7, 1986 Mr. Royer entered and inspected the defendants' property in his official capacity as appraiser for the Ferry County Assessor's Office.

3. The defendants' property was located in the area of Ferry County to be revalued in 1986 pursuant to the four year revaluation cycle. Mr. Royer also entered and inspected properties owned and occupied by the defendants' neighbors.

4. The entry road to the defendants' property passes through two gates. There were numerous no trespassing signs along the roadway, on the gates and upon the defendants' property on April 7, 1986.

5. Mr. Royer was given a key by a neighbor (Francis Wisener), in his capacity as a deputy appraiser. The key opened a lock on the first gate on the private road leading to the defendants' property. The first gate is on the Wisener property.

6. The second gate was open as Mr. Royer approached the defendants' property. Mr. Royer would have climbed

over the gate if it had been closed.

7. Mr. Royer first went to the defendants' residence and knocked. He then shouted to see if anyone was home. No one answered the door or his shouts. He then inspected the exterior of the residence and a shop also located on the property. He at no time entered either the residence or shop.

8. Mr. Royer was on the defendants' property for 10-15 minutes. The entry and inspection took place at about 1:00 p.m.; it was one of several entries and inspections he made on April 7, 1986.

9. Mr. Royer was acting solely in his capacity as an appraiser for the Ferry County Assessor's Office when he went to the defendants' property. He did not go to the property at the request of, or after talking to, anyone in law enforcement.

10. Immediately after leaving the defendants' property, Mr. Royer contacted Sheriff Richard Baldwin and informed him of his observations there.

11. Defendant John Vonhof is a co-owner of the property. He is also a property owner in Mason County, Washington.

12. He has paid taxes on his real property holdings in the State of Washington. He understands, and understood on April 7, 1986, that real property is periodically revalued by the county assessor. He assumed that a personal inspection would be made, but he did not expect the assessor would go past the no trespassing signs in his absence.

13. The defendants' property had not been appraised since 1932.

B. Citizen Informant's Ability to Identify Marijuana - On Face of Affidavit.

1. On April 8, 1986 Sheriff Richard Baldwin prayed for a search

warrant; part of his affidavit included the statement of Brian Royer; see pages 9, 10 and 11 of Exhibit 1 attached hereto.

C. Warrantless Entry Into Residence.

1. Sheriff Richard Baldwin served a search warrant which was limited to the defendants' shop on April 8, 1986 at about 3:00 p.m.

2. He drove to the defendants' property with four other officers.

3. The defendants' residence is located up the hill from the shop; the shop is completely visible from the residence and the two buildings are separated by about 100 yards.

4. When the Sheriff first arrived he and Deputy Jody Spurgeon went past the shop on up to the residence. Sheriff Baldwin believed the occupants might be armed. Further, he believed he might find more than one occupant.

5. Sheriff Baldwin contacted defendant John Vonhof in a driveway adjacent to the residence. Sheriff Baldwin stated why he was on the defendants' property and requested some identification. The Sheriff, followed by Deputy Spurgeon, then followed Mr. Vonhof into the residence where Mr. Vonhof obtained his driver's license. The officers did not have a search warrant for the residence.

6. Deputy Spurgeon conducted a security sweep of the house; i.e. he briefly entered each room. No one else was present.

7. In an upstairs bedroom Deputy Spurgeon observed, but did not seize, a scale.

8. Sheriff Baldwin noticed two rifles as he stood downstairs with Mr. Vonhof. He (Sheriff Baldwin) had the rifles emptied of ammunition. THe rifles were not seized.

9. Sheriff Baldwin and Deputy Spurgeon were in the residence for 5-10 minutes.

10. The Sheriff, Deputy Spurgeon and Mr. Vonhof then went down to the shop.

D. Acquisition of Bank Records Without Judicial Process.

1. On April 16, 1986 plaintiff's attorney issued subpoenas duces tecum for defendant Vonhof's bank records to the Republic Branch of Seattle-First National Bank and the Mason County Federal Credit Union in Belfair, Washington. The subpoenas duces tecum were issued without court process, and purported to require the bank and credit union to deliver these materials to plaintiff's attorney.

2. In compliance with the subpoenas duces tecum both depositories provided copies of their customer's records, namely the defendants, to the plaintiff's attorney.

E. Independent Source.

1. Effect of Illegal Entry on Second Warrant for House.

a. On April 18, 1986 Sheriff Baldwin prayed for two separate search warrants. The first warrant was only for the shop. The second warrant, which was prayed for only after the first was served, was for the house.

b. The information gained when the first warrant was issued was used as a basis for the second warrant; see Exhibit 1 attached hereto.

c. The language underlined on page 3 of Exhibit 1 was excised by the trial court at the suppression hearing.

2. Effect of Unlawful Ex Parte Issuance of Subpoena Duces Tecum on "Bank" Evidence.

a. When the second search warrant was served for the house on April 8, 1986, numerous bank records were found. Specifically, a Seattle-First National Bank Check Book Acc. #82734-377-0107, a share

deposit slip Mason County Federal Credit Union Acc. #16321-0 dated 2/20/86, and two deposit slips and a check register with Seattle-First National Bank were discovered under the warrant.

b. These items discovered under the second search warrant were discovered independent from the bank records provided in response to the ex parte subpoena duces tecum.

F. Intentional, or Reckless, Misrepresentation of Material Fact in Search Warrant Affidavits.

1. On April 8, 1986 Sheriff Baldwin swore out two search warrant affidavits. Both affidavits included the statement of appraiser Brian Royer. Therein Mr. Royer states:

> "I have smelled mature and/or growing marijuana in the past on at least 10 occasions. It has a distinct odor."

2. The second search warrant affidavit included the following statement

of affianr Sheriff Baldwin:

> "In my experience when a marijuana grow operation is located in the vicinity of a residence, the residence is often used to process and package the marijuana."

3. There was no evidence presented at the evidentiary hearing which showed that either of these statements was materially false or incorrect.

G. Multiple Searches Outside Scope of Search Warrants.

1. On April 8, 1986 law enforcement officers entered the defendants' property to search their shop and residence.

2. The officers were on the defendants' property continually from the afternoon of April 8th to the afternoon of April 9, 1986. They left the night of April 9th, but returned on April 10th. They also returned briefly again on April 14th to seize some electric transformers located in the attic of the shop, which

were used in the grow operation.

3. Sheriff Baldwin supervised the search and seizure on all four days. The officers who took part in the search of the premises and seizure of controlled substances and equipment were for the most part the same over the duration.

4. The officers were on the defendants' property for only one purpose, to search for controlled substances and evidence of dominion and control and to seize those items and equipment, or materials, used in the grow operation.

5. In the mind of Sheriff Baldwin, the search and seizures on the 10th were a continuation of those on the 8th and 9th.

III. CONCLUSIONS OF LAW

Based on the above hearing and findings of fact the Court makes the following conclusions of law:

A. Appraiser's Entry Onto the Defendants' Property.

1. Brian Royer was not acting as an agent for law enforcement officers; he was acting in his capacity as an appraiser for the Ferry County Assessor's Office. Further, Mr. Royer's entry and inspection was not an administrative search. The entry and inspection did not come within the protections to individual rights guaranteed by the Fourth Amendment to the United States Constitution and Art. 1, Sect. 7 of the Washington Constitution.

2. Mr. Royer acted pursuant to a legitimate governmental purpose when he entered the defendants' property; namely to assess the property's value.

3. The presence of no trespassing signs does not insulate individuals from entry onto their property. Such an expectation of complete privacy is not reasonable under applicable law.

4. The law of trespass does not afford an individual the same protections as afforded by the Fourth Amendment to the United States Constitution and Art. 1, Sect. 7 of the Washington State Constitution. A governmental official who is not acting as a law enforcement officer or an agent of a law enforcement officer can trespass on another's land without violating the other person's constitutional rights.

5. This case is controlled by State v. Ludvik, 40 Wn.App. 257, 698 P.2d 1064 (1985).

B. Citizen Informant's Ability to Identify Marijuana - On Face of Affidavit.

1. The citizen informant's ability to identify marijuana is shown by sufficient facts stated in the affidavit. These facts provided the magistrate with enough information to determine if the informant had adequate skill, training or

experience to identify marijuana.

C. Warrantless Entry Into Residence.

1. The facts are not sufficient to show a threat to the officers' safety, or the possibility of the destruction of evidence. No exigent circumstances existed to justify the warrantless entry into the house.

2. The entry was not pursuant to any implied consent of Mr. Vonhof.

3. The evidence discovered during the security sweep, namely two rifles and a set of measuring scales, are not admissible at trial.

D. Acquisition of Bank Records Without Judicial Process.

1. The acquisition of depositors' bank records was without court process and contrary to State v. Gunwall, 106 Wn.2d 54 (1986).

2. The plaintiff's subpoenas duces tecum were not issued in compliance

with CR 45.

3. The bank records provided in response to the two subpoenas duces tecum are not admissible at trial.

E. Independent Source.

1. Effect of Illegal Entry on Second Warrant for House.

a. The State has the burden of proof to show that the illegal security sweep did not taint the second search warrant for the house.

b. The State proved by a preponderance of the evidence that the second search warrant was not tainted by the illegal security sweep.

c. The information underlined on page 3 in Exhibit 1 should be excised from the Second Search Warrant Affidavit.

d. The remaining information in the Second Search Warrant Affidavit, after excisement, supports a finding of probable cause to search the

house.

e. The evidence seized under the Second Search Warrant is admissible at trial.

2. Effect of Unlawful, Ex Parte Issuance of Subpoenas Duces Tecum on "Bank" Evidence.

a. The bank records seized under the Second Search Warrant are clearly independent from any bank records provided in response to the subpoenas duces tecum.

b. Such untainted bank records are admissible at trial.

F. Intentional, or Reckless, Misrepresentations of Material Fact in Search Warrant Affidavits.

1. The defendants have not shown by a preponderance of the evidence that the statements of Brian Royer and Sheriff Richard Baldwin were made with a reckless disregard for the truth, or by way of deliberate, or intentional falsehood.

2. Reading the affidavits in a common sense manner the statements made by

Brian Royer and Sheriff Baldwin were true. Further, they were not conclusory, but rather statements of fact.

3. Even if the statements are assumed to not be true, their removal from the affidavits would make no difference in the finding of probable cause on the face of the affidavits.

G. Multiple Searches Outside Scope of Search Warrants.

1. Only one legal, authorized search and resulting seizure took place on April 8th, 9th and 10th, 1986. These days were unified by virtue of the same personnel with the same objective and the time interval, i.e., the night of April 9th, when the officers were absent, was reasonable.

2. The seizures on April 14th were pursuant to an unauthorized entry. The transformers seized on April 14th are not admissible at trial and were seized

illegally.

IV. ORDER

Based on the above hearing, findings, conclusions of law and the file herein, the Court hereby grants the defendants' motion as to the two rifles and set of measuring scales seized during the security sweep of the defendants' residence, the bank records seized under the ex parte subpoenas duces tecum and the transformers seized on April 14, 1986. These items are not admissible at trial. The defendants' motion is denied as to all remaining evidence seized.

DATED this 3 day of March, 1987.

/s/ Fred L. Stewart
J U D G E

APPENDIX B

[No. 8320-9-III. Division Three. April 7, 1988.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN C. VONHOF, ET AL, *Appellants*.

[1] **Searches and Seizures — Open View — Constitutional Search — Factors.** Whether the discovery of openly perceptible criminal activity by a governmental official legitimately visiting private property constitutes a search for purposes of the constitutional warrant requirement depends on the particular facts and circumstances. A court will consider whether the discovery was accidental and made during daylight hours and whether the official spied into a residence, took the normal and most direct route necessary to conduct his business, and acted openly and without subterfuge.

[2] **Searches and Seizures — Warrant — Affidavit — Sufficiency — Test.** An affidavit supporting the issuance of a search warrant is sufficient to establish probable cause to search if it sets forth the factual circumstances underlying the affiant's personal beliefs and gives the magistrate good reason to believe that criminal activity has occurred.

Nature of Action: Prosecution for manufacturing a controlled substance. A search warrant based on information provided by a tax appraiser resulted in the discovery of growing marijuana.

Superior Court: The Superior Court for Ferry County, No. 7800, Fred L. Stewart, J., entered a judgment of guilty on December 2, 1986.

Court of Appeals: Holding that the appraiser's actions did not constitute a search and that probable cause existed to issue the warrant, the court *affirms* the judgment.

Richard Troberman and *Timothy Ford*, for appellants.

Allen C. Nielson, Prosecuting Attorney, for respondent.

THOMPSON, J.—John C. Vonhof, Larry D. Bell, and Donald E. Noll appeal their convictions for manufacturing a controlled substance. They argue the trial court erred in refusing to suppress evidence seized pursuant to a search warrant issued on the basis of information supplied by a tax appraiser, and also because there was an insufficient basis for the warrant. We affirm.

Brian Royer, an appraiser with the Ferry County assessor's office, entered property owned by Mr. Vonhof and Mr. Bell to revalue the property for tax purposes. To reach the defendants' property, Mr. Royer had to pass through a locked gate. He obtained a key to open the gate from Francis Wisener, owner of the gate and across whose property the road to the defendants' property ran. Mr. Royer also passed through an open gate on the defendants' property. Several "No Trespassing" signs were posted on the gates and along the roadway leading to the defendants' property.

Mr. Royer proceeded to the defendants' residence and knocked and shouted to see if anyone was home. No one answered. At the suppression hearing, Mr. Royer testified he took photographs, measured the dimensions of a new porch addition on the residence and then examined the exterior of a shop building, which was 180 to 200 feet from the residence. The shop building was not on the tax rolls and never had been appraised. Mr. Royer knocked on the side of the shop building to determine whether it was insulated. As he approached an air vent, he noticed what he characterized as "the strong smell of marijuana". He continued to examine the exterior of the shop, and when he discovered the doors were open, he yelled into the building to determine if anyone was there. Mr. Royer did not enter either the residence or the shop building. He left after spending 10 to 15 minutes on the property, and immediately told the sheriff of his observations.

Mr. Royer provided a written statement for the sheriff, in which he said he had smelled

> the strong smell of marijuana. . . . It was a strong odor that smells stinky like a skunky, musty odor. I have smoked & been around marijuana in the past years & around the type that is grown indoors & is highly cultivated & that is the type of odor I smelled coming from this area of the bldg. I have smelled mature &/or mature growing marijuana in the past on at least 10 ocassions [*sic*]. It has a very distinct odor.

Sheriff Richard Baldwin applied for a search warrant the next day. His affidavit, to which Mr. Royer's statement was attached, stated:

> On April 7, 1986 at about 5:00 p.m. I interviewed Brian Royer at the Ferry County Sheriff's Office in Republic. At the conclusion of the interview I had Mr. Royer smell a small quantity of dried marijuana. He stated the odor was similar to the odor in the vented air. He stated the vented odor was more pungent, or stronger, and more like the odor of mature growing, or drying, marijuana.

On the basis of this information, a warrant was issued to search the shop building. The search, conducted later that

day, revealed marijuana growing in the shop building. A second warrant was issued based on evidence seized in the shop, authorizing a search of the residence and two vehicles. This search resulted in the seizure of evidence of the defendants' ownership and occupancy of the residence.[1]

The defendants were charged with manufacturing a controlled substance. They moved for suppression of the evidence, and the trial court made the following conclusions, pursuant to CrR 3.6:

A. Appraiser's Entry Onto the Defendants' Property.

1. Brian Royer was not acting as an agent for law enforcement officers; he was acting in his capacity as an appraiser for the Ferry County Assessor's Office. Further, Mr. Royer's entry and inspection was not an administrative search. The entry and inspection did not come within the protections to individual rights guaranteed by the Fourth Amendment to the United States Constitution and Art. 1, Sect. 7 of the Washington Constitution.

2. Mr. Royer acted pursuant to a legitimate governmental purpose when he entered the defendants' property; namely to assess the property's value.

3. The presence of no trespassing signs does not insulate individuals from entry onto their property. Such an expectation of complete privacy is not reasonable under applicable law.

4. The law of trespass does not afford an individual the same protections as afforded by the Fourth Amendment to the United States Constitution and Art. 1, Sect. 7 of the Washington State Constitution. A governmental official who is not acting as a law enforcement officer or an agent of a law enforcement officer can trespass on another's land without violating the other person's constitutional rights.

5. This case is controlled by *State v. Ludvik*, 40 Wn. App. 257, 698 P.2d 1064 (1985).

B. Citizen Informant's Ability to Identify Marijuana—On Face of Affidavit.

1. The citizen informant's ability to identify marijuana is shown by sufficient facts stated in the affidavit. These

[1]Defendant Noll apparently had no ownership interest in the property, but the parties appear to agree that Mr. Noll's privacy interests are identical to those of the other defendants.

> facts provided the magistrate with enough information to determine if the informant had adequate skill, training or experience to identify marijuana.

The trial court denied the motion to suppress, and the defendants were convicted on a stipulated record. This appeal followed.

The first issue is whether the appraiser's activities constituted an unconstitutional warrantless search. Relying on *State v. Ludvik*, 40 Wn. App. 257, 698 P.2d 1064 (1985), the trial court concluded that the visit by Mr. Royer was not a search, within the meaning of the Fourth Amendment or Const. art. 1, § 7, because he was not acting as a law enforcement officer or the agent of a law enforcement officer.

In *Ludvik*, a state game agent observed suspicious activities at the house across the street from his home. *Ludvik*, at 259. In response to the defendant's argument that the game agent's observations constituted a governmental search, the court observed that constitutional protections against unreasonable searches apply only to governmental actions, not to private citizens acting on their own initiative. *Ludvik*, at 262. The court held the game agent was not acting in his official capacity at the time of his observations. *Ludvik*, at 263.

This reasoning cannot be applied. Mr. Royer was acting not as a private citizen, but as an appraiser for the county assessor's office. He was acting as a governmental official. The State argues, nevertheless, that his activities did not invoke constitutional protections because he was not acting with law enforcement encouragement and had no enforcement authority. However, direct law enforcement involvement is not a prerequisite to application of the protections of either the Fourth Amendment or Const. art. 1, § 7. Those protections extend to the activities of school officials, *Kuehn v. Renton Sch. Dist. 403*, 103 Wn.2d 594, 694 P.2d 1078 (1985), building and health inspectors, *Camara v. Municipal Court*, 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 56 L.

Ed. 2d 305, 98 S. Ct. 1816 (1978), and federal tax agents, *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 50 L. Ed. 2d 530, 97 S. Ct. 619 (1977). As the Supreme Court observed in *New Jersey v. T.L.O.*, 469 U.S. 325, 335, 83 L. Ed. 2d 720, 105 S. Ct. 733, 739 (1985), "it would be 'anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.' *Camara v. Municipal Court, supra*, at 530." Nor is it essential that the governmental agent has enforcement authority:

> [T]here is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately.

Michigan v. Tyler, 436 U.S. 499, 506, 56 L. Ed. 2d 486, 98 S. Ct. 1942 (1978). It was error to conclude that Mr. Royer's visit was not a search simply because he was not a law enforcement officer or the agent of a law enforcement officer.

[1] The State argues the Mr. Royer's visit nevertheless was not an unconstitutional search. It relies on the rationale in *State v. Seagull*, 95 Wn.2d 898, 901-03, 632 P.2d 44 (1981):

> The mere observation of that which is there to be seen does not necessarily constitute a search within the meaning of the Fourth Amendment. *State v. Glasper*, 84 Wn.2d 17, 20, 523 P.2d 937 (1974); *State v. Martin*, 73 Wn.2d 616, 440 P.2d 429 (1968) [*cert. denied*, 393 U.S. 1081, 21 L. Ed. 2d 773, 89 S. Ct. 855 (1969)]; *Recznik v. Lorain*, 393 U.S. 166, 21 L. Ed. 2d 317, 89 S. Ct. 342 (1968). As stated in 1 W. LaFave, *Search and Seizure* § 2.2, at 240 (1978) (hereinafter LaFave):
>
> > As a general proposition, it is fair to say that when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are

> used, that detection does not constitute a "search" within the meaning of the Fourth Amendment.
>
> . . .
>
> The presence of an officer within the curtilage of a residence does not automatically amount to an unconstitutional invasion of privacy. Rather, it must be determined under the facts of each case just how private the particular observation point actually was. It is clear that police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house. In so doing they are free to keep their eyes open. *See generally* LaFave, at § 2.3. An officer is permitted the same license to intrude as a reasonably respectful citizen. *United States v. Vilhotti*, 323 F. Supp. 425 (S.D.N.Y.), *aff'd in part and rev'd in part*, 452 F.2d 1186 (2d Cir. 1971), *cert. denied*, 406 U.S. 947, 32 L. Ed. 2d 335, 92 S. Ct. 2051 (1972). However, a substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy.
>
> What is reasonable cannot be determined by a fixed formula. It must be based on the facts and circumstances of each case. *Ker v. California*, 374 U.S. 23, 33, 10 L. Ed. 2d 726, 83 S. Ct. 1623 (1963).

(Footnote omitted.) In *Seagull*, a police officer knocked on a door of a house; receiving no answer, he walked through the yard to another entrance. His route, not the most direct, took him close to outbuildings and a greenhouse, where he observed what he believed was a marijuana plant. *Seagull*, at 900. The court concluded the officer's actions did not constitute a search, based on the following factors: (1) He did not spy into a residence; (2) his route was a normal one, considering his purpose; (3) he was not secretive, but acted openly in an honest attempt to talk with the occupants; (4) he did not get as close as he could have, but kept his distance; (5) the discovery was accidental; (6) he did not create an artificial vantage point; (7) the acts occurred in daylight; and (8) he strayed only slightly from the most absolutely direct route necessary to conduct his "legitimate police business". *Seagull*, at 905.

Mr. Royer was on legitimate business when he inspected the defendants' property. RCW 84.40.025 authorizes the assessor to visit, investigate and examine property at any reasonable time.

> Access to property required. For the purpose of assessment and valuation of all taxable property in each county, any real or personal property in each county shall be subject to visitation, investigation, examination, discovery, and listing at any reasonable time by the county assessor of the county or by any employee thereof designated for this purpose by the assessor.
>
> In any case of refusal to such access, the assessor shall request assistance from the department of revenue which may invoke the power granted by chapter 84.08 RCW.

RCW 84.40.025.

The presence of "No Trespassing" signs cannot be characterized as "refusal to such access" under the statute.

> A duty or authority imposed or created by legislative enactment carries with it the privilege to enter land in the possession of another for the purpose of performing or exercising such duty or authority in so far as the entry is reasonably necessary to such performance or exercise, if, but only if, all the requirements of the enactment are fulfilled.

Restatement (Second) of Torts § 211 (1965). In addition, the presence of the "No Trespassing" signs does not increase the constitutional level of privacy interests enjoyed by the defendants. *See Oliver v. United States*, 466 U.S. 170, 179, 80 L. Ed. 2d 214, 104 S. Ct. 1735 (1984).

Because Mr. Royer was legitimately on the property, application of the *Seagull* factors is appropriate: (1) He did not spy into the residence, and never entered either building; (2) his route was a normal one, considering his purpose of inspecting the new structure; (3) he acted openly and honestly, by knocking at the residence and yelling outside the shop building; (4) he apparently got very close to the shop, but no closer than necessary to conduct his inspection, and he did not enter the shop's open doors; (5) his discovery was accidental; (6) he did not create an artificial

vantage point to smell the growing marijuana; (7) his inspection occurred in the daytime; and (8) he went only where he needed to go to conduct his inspection.

Thus, under the *Seagull* rationale, Mr. Royer's visit was not a search within the meaning of the Fourth Amendment or of Const. art. 1, § 7, and the trial court's refusal to suppress the evidence was proper.

[2] The second issue is whether Mr. Royer's olfactory perceptions established probable cause to search. The question of whether probable cause justifies the issuance of a warrant should not be viewed in a hypertechnical manner. *State v. Walcott*, 72 Wn.2d 959, 962, 435 P.2d 994 (1967), *cert. denied*, 393 U.S. 890, 21 L. Ed. 2d 169, 89 S. Ct. 211 (1968); *United States v. Ventresca*, 380 U.S. 102, 109, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965).

> Considering all the facts and circumstances sworn to by the person seeking the warrant, the issuing magistrate must have good reason to believe criminal activity has occurred. *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869 [*cert. denied*, 449 U.S. 873, 66 L. Ed. 2d 93, 101 S. Ct. 213] (1980); *State v. Patterson*, 83 Wn.2d 49, 515 P.2d 496 (1973).

State v. Matlock, 27 Wn. App. 152, 155, 616 P.2d 684 (1980). "The determination of probable cause should be given great deference by reviewing courts". *Seagull*, at 907.

In *Matlock*, the court held that probable cause was lacking because there was no showing in the affidavit that the officer had "the necessary skill, training or experience to identify marijuana plants on sight . . ." *Matlock*, at 156. In *Seagull*, the affidavit was sufficient, even though the officer's observation was incorrect, because "it stated more than a mere personal belief. It also stated the factual, underlying circumstances upon which that belief was premised". *Seagull*, at 907.

Here, Mr. Royer's belief that what he smelled was growing marijuana was presented to the magistrate as more than a mere personal belief. He specifically described the odor, and he stated he had smelled mature or growing marijuana

at least 10 times before. The issuing magistrate found this to be factually sufficient to issue a search warrant. In so doing he did not abuse his discretion.

Affirmed.

McInturff, C.J., and Munson, J., concur.

APPENDIX C

The Supreme Court
State of Washington

September 1, 1988

Re: Supreme Court No. 55298-3 - State v. John Vonhof, Larry Bell and Donald Noll

Court of Appeals No. 8320-9-III

Counsel:

The above entitled petition for review was considered by the Court on its August 31, 1988, petition for review calendar.

The petition was denied by order number 181/105 filed on September 1, 1988.

Very truly yours,

/s/

STEVEN P. HELGESON
Deputy Clerk

SPH:mja